(1) Supreme Court, U.S.
FILED

96 990 DEC 19 1996

No.

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In The

Supreme Court of the United States

October Term, 1996

FELTON E. HUDSON; GEORGE DUNCAN; R. TEX RITTER, *et al.*,

Petitioners,

vs.

DELTA AIR LINES, INC., *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit erred in affirming the denial of class certification to Petitioners based upon its substantive determination under ERISA, and in direct conflict with the Sixth Circuit, that a bilateral contract pertaining to health benefits cannot exist between employer and employee independent of a company's formal plan document even if such contract is embodied in writings from the employer?

II. Whether the Eleventh Circuit erred in affirming the denial of class certification to Petitioners based on an analysis of ERISA breach of fiduciary duty claims which directly conflicts with this Court's decision in *Varity* and is also inconsistent with the Third Circuit's decision in a parallel case?

III. Whether the Eleventh Circuit erred in affirming the denial of class certification on Petitioner's ERISA-based breach of fiduciary duty claims by applying an analysis of commonality under Fed. R.C. P. 23(a) which places it on a strikingly divergent path from other circuits in parallel cases?

PARTIES TO THE PROCEEDINGS BELOW

GEORGE BAILEY, *Petitioner-Plaintiff.*

W.R. BRAHAM, in his official capacity as a member of the Delta Air Lines Administrative Committee, *Respondent-Defendant.*

JAMES S. BROWN, JR., *Petitioner-Plaintiff.*

JOSEPH CARRABINO, *Petitioner-Plaintiff.*

CAROLYN CASSELL, *Petitioner-Plaintiff.*

CHARLES CHAMBERS, *Petitioner-Plaintiff.*

R.W. COGGIN, in his official capacity as a member of the Delta Air Lines Administrative Committee, *Respondent-Defendant.*

DELTA AIR LINES, INC., *Respondent-Defendant.*

GEORGE DUNCAN, *Petitioner-Plaintiff.*

H.D. GREENBERG, in his official capacity as a member of the Delta Air Lines Administrative Committee, *Respondent-Defendant.*

ROBERT S. HARKEY, in his official capacity as a member of the Delta Air Lines Administrative Committee, *Respondent-Defendant.*

R.H. HEIL, in his official capacity as a member of the Delta Air Lines Administrative Committee, *Respondent-Defendant.*

BETTY HOFELE, *Petitioner-Plaintiff.*

FELTON E. HUDSON, *Petitioner-Plaintiff.*

RUSS KING, *Petitioner-Plaintiff.*

JERRY LILLY, *Petitioner-Plaintiff.*

FRANK LYNCH, *Petitioner-Plaintiff.*

R.A. MCCLELLAND, in his official capacity as a member of the Delta Air Lines Administrative Committee, *Respondent-Defendant.*

JOSEPH P. MCDANIEL, *Petitioner-Plaintiff.*

ED MILLER, *Petitioner-Plaintiff.*

ERNIE PARISEAU, *Petitioner-Plaintiff.*

JIM PEOPLES, *Petitioner-Plaintiff.*

R. TEX RITTER, *Petitioner-Plaintiff.*

GARY ROBINSON, *Petitioner-Plaintiff.*

T.J. ROECK, in his official capacity as a member of the Delta Air Lines Administrative Committee, *Respondent-Defendant.*

NEIL ROWE, *Petitioner-Plaintiff.*

JOHN D. WALLACE, *Petitioner-Plaintiff.*

W. TRAVIS WHITAKER, *Petitioner-Plaintiff.*

ELLA MAE WILLIAMS, *Petitioner-Plaintiff.*

MAURICE WORTH, in his official capacity as a member of the Delta Air Lines Administrative Committee, *Respondent-Defendant.*

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Petitioners Felton E. Hudson, George Duncan, and R. Tex Ritter, *et al.*, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 18a-34a) is reported at 90 F.3d 451. The opinion of the district court denying class certification (App. 42a-50a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 5, 1996. A timely petition for rehearing was denied by the court of appeals on September 20, 1996. This petition is filed within ninety days of the entry of the order denying the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 13 of the Rules of the Supreme Court.

RULES AND STATUTORY PROVISIONS INVOLVED

The pertinent section of the Federal Rules of Civil Procedure involved in this appeal is Rule 23, section (a).

Federal Rule of Civil Procedure 23(a) provides:

> (a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical

> of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Another pertinent statutory provision at issue in this case is 29 U.S.C. § 1104, section (a).

Section (a) of 29 U.S.C. § 1104 provides:

> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.
>
> (2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

An additional statutory provision pertinent to this case is 29 U.S.C. § 1132, subsection (a)(1) (B).

Subsection (a)(1)(B) of 29 U.S.C. § 1132 provides:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought —
>
> (1) by a participant or beneficiary —

* * *

> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

STATEMENT OF THE CASE

A. Basis for Jurisdiction in the District Court

The district court had jurisdiction of this matter pursuant to 29 U.S.C. §§ 1332(e)(1) & 1140 and 28 U.S.C. §§ 1331 and 1343(a)(4).

B. Statement of the Facts

Petitioners are a group of Delta retirees who seek to serve as class representatives for between 1,800 and 2,000 fellow Delta retirees who were herded into early retirement between July 3, 1992 and January 1, 1993, by promises that later proved to be false. These individuals retired based on Delta's repeated assurances, in several official written company statements and at carefully scripted pre-retirement seminars, that if these people accepted early retirement on or before January 1, 1993, they would be "grandfathered" into their existing, generally cost-free medical benefits. [R2-20-6-8, Ex. A, B, K, L-2; R3-26, Ex. C; R3-28, Ex. A]. The writings and seminar leaders further advised the retirees that if they failed to accept early retirement by the specified date, their medical benefits would be sharply reduced. [R2-20, Ex. J, K, L-3].

The reduction in medical benefits had many aspects, ranging from substantially increased deductibles to the discontinuance of Medicare Part B reimbursement. While the changes were significant standing alone, Delta had far more in store for those who did not accept the offer. After January 1, 1993, any employee taking early retirement would be responsible for *100%* of their health insurance premiums until age 62. [R2-20, Ex. J, ¶12]. Delta, the retirees were further told, had no plans to offer any better retirement plan than the one being offered, so they had better become "grandfathered" before it was too late. [R2-20, Ex. B, ¶9]. Delta had such an avalanche of employees responding to its offer that the company had severe difficulty processing all of the applications prior to the January 1, 1993 deadline.

In mid-1993, Delta mailed a startling announcement to those who retired in the wake of Delta's offer: beginning January 1, 1994, they were no longer grandfathered as Delta had promised. All would see a significant reduction in their medical benefits and, for the first time, premiums unrelated to their years of service would be imposed. [1] [R2-20, Ex. C]. Then in August 1993, contrary to the earlier statements of Delta, Delta offered retirement-eligible employees who did not "go for the bait" in 1992 a package of attractive enhanced retirement benefit incentives if they retired by November 1, 1993. [R2-20, Ex. F].

By this point, it had become clear that the "first wave" of early retirees were sold a bill of goods. Notwithstanding its earlier and oft-repeated assurances about "grandfathering" health benefits, Delta now took the incredible position that since the 1992 supplement to its medical benefits handbook inserted

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1. Documentary evidence obtained by Appellants' counsel after the district court's ruling indicates that, if Delta is permitted to get away with its current alteration of medical benefits, it intends to further reduce the retirees' medical benefits, as well as increase the cost of such benefits.

the statement (for the first time in company history) that Delta reserved the right to modify medical benefits, its assurances (which Delta disingenuously tries to read out of existence) did not matter. The retirees, Delta said, had been "grandfathered" into something which could be changed at Delta's whim. According to Delta, the company was free to reduce or even completely eliminate health benefits to all of the "grandfathered" retirees.

Delta made its sales pitch for early retirement to putative class members through highly standardized announcements that were authored by high-ranking company officials who also served as ERISA fiduciaries. The initial announcement of imminent changes in Delta's medical insurance benefits for retirees — the announcement that heralded Delta's effort to induce senior employees to retire by year-end — was made in a July 23, 1992 memo [R2-20, Ex. J] that was distributed to all of Delta's U.S. personnel by the Senior Vice President of Personnel. Delta's "Senior Vice President - Personnel" is its Senior Officer for personnel benefits and the Chairman of the Administrative Committee for all ERISA plans sponsored by the company. This memo warned that medical insurance benefits and the premium structure for retirees would dramatically change for those who did not retire by January 1, 1993. [R2-20, Ex. J at ¶ 12].

An October 5, 1992 Memorandum that "clarified" the benefit changes that would be effective January 1, 1993, was authored by the Assistant Vice President - Personnel Benefits and was sent to "All Department Heads and Management Personnel." [R2-20, Ex. L] The Memorandum explained that, "*Those individuals who are active Delta employees on August 31, 1991 and who are 52 and older on January 1, 1992 were grandfathered. Those individuals who were grandfathered are not required to pay premiums regardless of their years of service provided they retire on or before January 1, 1993.*" (Emphasis

added). The Memorandum also promoted the advantages of retiring on or before January 1, saying, "Those individuals who retire prior to or on January 1, 1993 *will retire with the current deductible* ($100 per individual/$300 per family), *out-of-pocket maximum* ($750 per individual/$1,500 per family) and the *carryover provision.* Also, *Medicare Part B reimbursement will continue for personnel who retire prior to or on January 1, 1993.*" (Emphasis supplied). The memo failed to include any mention that the "grandfather" provision was really not a grandfather provision at all and could be rendered nugatory at any time, nor did it include any mention of a "reservation of rights." From the standpoint of what Delta was seeking to accomplish — reduce the ranks of its older employees — any such language would have been highly counterproductive.

The Delta assurances upon which the Petitioners relied were also affirmed in the most standardized document of all — the company's centralized compilation of official policies known as "Delta Standard Practices." Delta's Standard Practices are routinely used as a reference by all the company's employees in their day to day work. Delta's Standard Practice 1032.3 provides in pertinent part:

> If the employee was employed by Delta prior to August 16, 1991 and is at least 52 years of age by January 1, 1992, *the employee and any eligible family members will continue to be provided full company-paid medical/ dental coverage during retirement,* regardless of length of service. (*Former Pan Am personnel are not included in this grandfather provision.*)

[R3-27, Def. Ex. 19 to Ex. 3 at 4 (Emphasis supplied)]. This Standard Practice remained in force *throughout* 1992. The

"grandfather provision" speaks for itself — if the employee met the stated criteria, he and his family would "continue to be provided full company-paid medical/dental coverage during retirement. . ."

Delta made other standardized postings that were also clearly intended to stress the benefits of retiring on or before January 1, 1993 and the severe impact of remaining with the company after that date. [R2-20, Ex. K]. In these documents, the phrase "Grandfather provision still applies" appears prominently under the "Retirement Prior to January 1, 1993" and "Retirement on January 1, 1993" rubrics. Again, no language of any kind can be found in the document alerting the employee that the "grandfather" provision Delta was offering to its employees was in fact illusory. Other documents — all emanating from Delta's Personnel Department — reiterated the same message [R2-20, Ex. K] as did Delta's well-scripted pre-retirement seminars and "Benefits Hotline."

It is beyond reasonable debate that Delta employed a "carrot and stick" strategy to get its older, long-term employees to retire. The main stick was the threat that medical insurance benefits for retirees would drastically decrease (and be subject to further decrease) for anyone who waited until after January 1, 1993 to retire and that early retirement, henceforth, meant assuming 100% of the cost of health insurance premiums. The main carrot was Delta's promise that those who retired by January 1, 1993 would continue to receive "full company-paid medical/dental coverage during retirement" under a "grandfather provision" notwithstanding the major changes in health benefits in store for others.

Delta's carefully scripted retirement seminars augmented the company's writings. The hardsell was obvious, and the sales pitch worked like a charm. Believing what the company

promised them, the number of Delta employees who accepted early retirement between the first announcement of the early retirement plan on July 23, 1992 and its conclusion on January 1, 1993 was unprecedented in the company's history: 1,833 in five months, compared with a few hundred over an entire typical year. [R3-28-3-4].

The retirees the Petitioners seek to represent are, by and large, career-long employees of Delta. They were an integral part of the company's growth from a regional airline to a major international carrier. Having been told throughout their careers that they were part of the "Delta family" and that they would "not retire *from* Delta but *with* Delta", they are now faced with the bitter reality of living their retirement years with sharply diminished health benefits from a company that misled them into early retirement.

C. Course of Proceedings and Disposition Below

On May 16, 1994, Petitioners filed the present action, a class action lawsuit in the United States District Court for the Northern District of Georgia. [R1-1].[2] In addition to class-action allegations, the Complaint contains five counts. Count I is an ERISA breach of contract claim, asserting that Delta breached a bilateral contract regarding the vesting of health insurance benefits. The claim was patterned after the contract claims successfully asserted in *Sprague v. General Motors Corp.*, 843 F. Supp. 266 (E.D. Mich. 1994), *aff'd*, 92 F.3d 1990 (6th Cir. 1996), a major class-action with underlying facts closely resembling those in the case at bar. The essence of the claim in Count I is that nearly 2,000 Delta employees accepted early retirement based upon Delta's promise in standardized memoranda, official notices and other documents distributed on

2. On July 27, 1994, Petitioners filed an Amended Complaint, adding additional defendants. [R1-3].

a company-wide basis (and confirmed in carefully scripted pre-retirement seminars) that individuals meeting the criteria would be "grandfathered" into their existing, generally cost-free benefits if they left the company on or before January 1, 1993.

Count II alleges a breach of fiduciary duties under ERISA by virtue of Delta's plan administrators providing false assurances to its employees that if they retired on or before January 1, 1993, they would receive their pre-retirement medical insurance benefits throughout the course of their retirement when in fact Delta planned to alter these benefits. Count II also alleges that Delta's plan administrators falsely assured the company's employees that enhanced retirement benefits subsequent to January 1, 1993 were not being considered by the company, when in fact they were.

Count III is closely related to Count II. It alleges interference with the receipt of ERISA benefits, based upon Delta fraudulently inducing the retirement of the Plaintiff class, and thereby interfering with the retirees' right to the retirement benefits they would have obtained if they had deferred their retirement. Count IV alleges discrimination in providing ERISA benefits, based upon Delta knowingly giving false assurances to Petitioners that no package of enhanced retirement benefits would be offered in the future, and then extending such a package to later retirees.[3]

On August 12, 1994, Petitioners timely filed a Motion for Class Certification. [R1-11]. The Motion sought certification under either Rule 23(b)(2) or 23(b)(3). Respondents filed a Brief

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3. Count V of the Complaint, which asserted a breach of contract claim based upon Delta's revocation of flight benefits to any retiree that became employed at a non-affiliated airline, was dismissed by the district court on the ground that it was outside its supplemental jurisdiction under 28 U.S.C. § 1367(a). Count V is not at issue in this petition.

in Opposition to the Motion for Class Certification [R2-16]. On November 4, 1994, the district court entered an Order denying the motion for class certification. [App. 42a-50a].

The court's discussion of why class certification was being denied was as startling as it was brief. It never reached Fed. R. Civ. P. 23(b)(2) or (b)(3), holding instead that Plaintiffs had not satisfied the prerequisites of commonality and typicality under Fed. R. Civ. P. 23(a). Specifically, the Court reasoned:

> According to Plaintiffs, Delta made the representations that are at issue in this case orally, during several retirement planning seminars, and in writing, in various mailouts and flyers posted on bulletin boards. Plaintiffs must show not only whether each retiree was aware of these representations, but more importantly, the extent to which each retiree relied on the alleged representations in making his or her retirement decision. These are factual issues that must be resolved independently for each retiree.
>
> The common issues of law in fact required by Rule 23(a)(2) are absent in this case. Plaintiffs have failed to show how the issue of each retirees' reliance on Delta's representations, a necessary element to all the ERISA claims, is susceptible to class proof. Accordingly, Plaintiffs' Motion to Certify Class Action is denied.

[App. 49a].

Following the Court's ruling, Plaintiffs filed a Motion for Reconsideration or, in the Alternative, for Certification Under 28 U.S.C. §1292(b). The Motion for Reconsideration was denied, but the Court granted the Motion for Certification. [App. 38a-41a]. The Court's November 4 Order was amended to include a certification authorizing an interlocutory appeal on the issue of class certification. [App. 40a-41a]. Petitioners promptly sought interlocutory review by the United States Court of Appeals for the Eleventh Circuit.

Perhaps because of the significance of the case and the large number of people impacted, the Eleventh Circuit granted Petitioners' Petition for Permission to Appeal. On March 29, 1995, the District Court entered an Order staying the proceedings and discovery pending appeal. [R3-57]. On August 5, 1996 the Eleventh Circuit affirmed the district court's decision. [App. 36a-37a].

The Eleventh Circuit's decision is inexplicable. Its opinion fails to distinguish or even mention the decisions certifying class actions in very closely parallel cases (including *Sprague*), despite the fact that the Petitioners' briefs had brought these cases to the attention of the court. In addition, the court's discussion refuses to recognize or quote any of the key supportive documents cited by the Petitioners.

The Eleventh Circuit's decision is a dangerous precedent for employees seeking relief under ERISA. In addressing the Petitioners' Count I contract claim, the court premised its decision on a controversial holding it had rendered in a prior case to the effect that a breach of contract claim under ERISA must be based exclusively on promises made in an ERISA summary plan description and that the company is otherwise insulated from contractual liability. [App. 28a-32a]. The court then went on to say that even if it was to "assume" that deceptive

statements by ERISA fiduciaries could support a claim, the record here consists solely of "informal company communications" which never assured Plaintiffs "that the terms of their coverage would never change." [App. 32a]. In making this statement, the Court gave no consideration whatsoever to any of the company-issued documents cited above which explicitly stated Delta's promise to "grandfather" those who met the stated criteria provided they left the company on or before January 1, 1993. [*Id.*; App. 5a-11a].

The court's analysis was equally flawed with regard to the ERISA claims plead in Counts II through IV. To begin with, the court inaccurately stated that these claims were premised solely on Delta's misleading representations that it had no plan to offer a future package of enhanced retirement benefits [App. 21a-22a, 30a], when it is clear from the face of the complaint that these claims are directed not only to the representations regarding future offers of enhanced retirement benefits but also to Delta's false representations regarding the medical insurance and other benefits that were being offered the members of the potential class. [R.1-1].

On the heels of this incorrect assumption the court's opinion applies criteria which place almost insuperable barriers to class certification on most ERISA breach of fiduciary duty claims. Instead of considering the issues and evidence the Petitioners had in common, the court looked for an issue which may need to be individually determined and found on that basis alone that Petitioner's ERISA claims lacked commonality. To be precise, the court, laboring under the erroneous assumption that the Petitioner's ERISA claims were based solely on the possible future offering of another early retirement plan, found that the question of whether class members would have delayed retirement in hopes of receiving an improved early retirement plan (if they had received accurate information regarding Delta's

scheme to offer such a plan in the future) is an issue which "would have necessarily have been highly individualized for each potential retiree." [App. 30a-31a]. The court's reasoning ignores altogether the Petitioners' common interest in having candid information from their ERISA fiduciaries regarding planned future offers when making their decisions regarding early retirement and the fact that courts in other circuits have willingly certified classes which involve similar issues of reliance. In affirming the district court, the Eleventh Circuit has effectively rewritten the commonality requirement under Federal Rule of Civil Procedure 23(a).

Petitioners sought reconsideration of the class certification issue by the Eleventh Circuit, but to no avail. Their motion was denied without explanation. [App. 1a-2a].

REASONS FOR GRANTING THE WRIT

This petition presents critical issues regarding when class actions may be utilized in the context of ERISA claims and the ability of retirees to hold their former employers accountable for promises made and knowingly not kept. It is evident that different circuits are applying contradictory standards as to when such actions are authorized. Such inconsistent holdings present a particular quandary in light of the fact that Congress, in enacting ERISA's sweeping pre-emption provisions, sought to bring about the creation of a uniform set of standards with respect to employee benefits. In this case, the circuit court's view of what claims are permitted under ERISA has resulted in denial of class certification, which, as a practical economic matter, is often the only feasible way cases of this sort can be presented.

The analysis of the Eleventh Circuit means that retirees who file their claims in the Eleventh Circuit become second class ERISA citizens. The denial of class certification here is markedly

inconsistent with the treatment accorded very similar claims in other circuits. These inconsistencies — and their unjust impact upon the Petitioners — can only be remedied through grant of a writ of certiorari.

I. The Eleventh Circuit's Refusal to Recognize Bilateral Contract Claims Against Employers With ERISA Welfare Benefit Plans Permits Employers to Renege On Their Agreements With Retirees, in Stark Contrast to the Sixth Circuit's Determination on the Same Issue.

The Eleventh Circuit refused to authorize certification of a class on the Petitioners' contract claim, despite the fact that certification of a plaintiff class presenting a very similar claim involving some 84,000 employees and billions of dollars in benefits has been authorized by the Sixth Circuit. The Eleventh Circuit and the Sixth Circuit have diametrically opposing views as to whether contract claims independent of a formal ERISA plan document are cognizable.

As noted above, Count I of the Complaint claims that Delta entered into a bilateral contract with Petitioners and similarly situated retirees that was independent from the company's formal ERISA plan: a contract under which they were plainly offered protected insurance benefits throughout their retirement in exchange for their agreement to retire by a specified date. The propriety of such a bilateral contract claim was straightforwardly endorsed by the Sixth Circuit in *Sprague v. General Motors Corp.*, 92 F.3d 1425, 1433-34 & 1439-40 (6th Cir. 1996). As the court held:

> We find on the facts of this case that General Motors entered into contractual agreements with its early retirees whereby the company vested certain health care benefits in the retirees and their spouses in exchange for the

> early retirees' acceptance of early retirement and, in some cases, their release of General Motors from any claims of unlawful termination. As the district court found, 'early retirement was presented . . . as a special package deal that included health care, separate and distinct from the regular GM retirement program. . . . **We agree with the district court that the information on health care supplied to early retirees formed the basis of an agreement apart from the company's regular health care plan to provide early retirees with vested health care benefits in exchange for defined consideration . . . and affirm the district court's judgment in favor of the early retirees on this issue.**

Id. at 1440, *quoting Sprague v. General Motors Corp.*, 843 F. Supp. 266, 271 (E.D. Mich. 1994). In its opinion, the Sixth Circuit also affirmed the certification of a class of early retirees whose claim was based on the contract recognized by the court. *Sprague*, 92 F.3d at 1430-33. *See* Part III, *infra.*

The Eleventh Circuit's decision could not be more at odds with that of the Sixth Circuit. It affirmed the denial of class certification under Count I based exclusively on its conclusion that there is no cognizable claim for breach of contract regarding retirement benefits other than one based on the text of the benefit "plan documents" themselves. The Eleventh Circuit held:

> [T]he merits of the Count I contract cause depend simply on evidence of the formation of the bilateral contract alleged therein. This will require proof of written plan documents

> which notified the putative class that the terms of their medical benefits plan would remain constant throughout their retirement if they retired on or before January 1, 1993. 'ERISA requires that welfare benefit plans be governed by written plan documents which are to be prepared and filed in compliance with ERISA's reporting and disclosure requirements. . . . Accordingly, any retiree's right to lifetime medical benefits at a particular cost can only be found if it is established by contract under the terms of the ERISA-governed benefit plan document." . . . This type of claim seems, on the surface, to be amenable to class-wide proof. So far, however, the plaintiffs have failed to demonstrate the existence of such written plan documents. The plaintiffs' reliance on the alleged uniform oral statements guaranteeing the same level of medical benefits throughout their retirement is of no help because 'there [is] no federal common law right to promissory estoppel under ERISA in cases involving oral amendments to or modifications of employee plans governed by ERISA.'

90 F.3d at 457-58 (footnotes omitted), *quoting Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). In essence, the Eleventh Circuit has refused to recognize any cause of action arising from a bilateral contract for retirement benefits between a prospective retiree and his or her employer that is not strictly based upon the employer's ERISA plan.

Petitioners fully recognize that ERISA "does not create any substantive entitlement to employer-provided health benefits" and that "plan sponsors are generally free under [the Act], for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, __ U.S.__, 115 S. Ct. 1223, 1228, 131 L. Ed. 2d 94 (1995). This cannot properly mean, however, that the sponsor of an ERISA plan should be considered exempt from the ordinary obligations of contract with regard to its retiring employees. Delta was faced with an increasingly competitive air travel industry and sought to decrease its personnel expenses. The company could have resorted to involuntary lay-offs, but these would have produced huge repercussions throughout the company and a tarnished public image. To avoid these negative consequences, Delta opted to push its long-term employees into "voluntary" early retirement by promising them benefits that were above and beyond those provided in the company's formal ERISA document. A standard bilateral contract was established — *i.e.*, if you meet certain criteria and you leave the company by a specified date, you are "grandfathered" with respect to your existing company-provided, company-paid health benefits.

The Petitioners and those they seek to represent here not only gave up future income by retiring upon the premature timetable selected by Delta rather than the timetable indicated by their personal circumstances. Their early retirement also caused them to receive significantly reduced pension benefits. Delta, and other companies who do what Delta did, should not be permitted to escape the ordinary obligations of contract by hiding behind the mere fact that it has an ERISA plan. The Eleventh Circuit's opinion allows the company to do just that. The Sixth Circuit, in absolute contrast, has recognized that a company's independent contractual obligations to its retirees can co-exist with an ERISA-based employee welfare benefit plan.

The Eleventh Circuit's decision, if allowed to stand, will allow companies within the Eleventh Circuit's reach to enter into agreements with their employees that have all the trappings of contracts and to blithely accept the benefits of these agreements but then walk away from fulfilling the promises they used to extract the benefits they received. Whereas a central policy objective of ERISA is to protect the interest of employees and their beneficiaries in employee benefit plans (*Shaw v. Delta Airlines,* 463 U.S. 85, 90, 105 S. Ct. 2890, 2896 (1983)), the Eleventh Circuit's approach turns this principle on its head. It denies retirees any means by which to redress the breach of contract inflicted upon them by their trusted long-term employer — and it does it on the basis of a statute whose very title (Employees Retirement Income Security Act) signifies a congressional intent to protect retirement benefits.

II. The Eleventh Circuit's Treatment of Petitioner's Breach of Fiduciary Duty Claim Ignores This Court's Decision in *Varity* and Is Inconsistent With The Third Circuit's Decision in a Parallel Case.

Count II of Petitioner's complaint asserts that Delta's ERISA plan administrators breached their fiduciary duty by "selling" Petitioners upon early retirement with false assurances regarding the company's intentions. Such a claim is clearly authorized by the recent case of *Varity Corp. v. Howe,* __ U.S. __, 116 S. Ct. 1065 (1996).[4] The Eleventh Circuit, however, rejected Petitioner's request for certification of a class to pursue a breach of fiduciary duty claim.

In *Varity* this Court held that "ERISA requires a 'fiduciary'

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4. This Court's decision in *Varity* was brought to the attention of the Eleventh Circuit prior to its decision through the submission by Petitioners of a Motion to Consider Citation of Supplemental Authority. The Eleventh Circuit, however, never mentioned it in its opinion.

to 'discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries' " and "'[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.' " *Varity*, 116 S. Ct. at 1074, *quoting Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983). The Court further held that when an individual who serves as both a high-ranking company official and a fiduciary officer of the company's ERISA plan uses misleading statements about the company's future financial health with the intention of misleading employees into voluntarily surrendering ERISA rights, that officer has breached his fiduciary obligations toward those employees. *Varity*, 116 S. Ct. at 1071-74. This type of conduct is precisely the type of conduct as to which Petitioners seek redress under Count II.

In *In re Unisys Corp. Retiree Medical Benefits "ERISA" Litigation*, 57 F.3d 1255 (3rd Cir. 1995), *cert. denied, Unisys Corp. v. Pickering*, __ U.S. __, 116 S. Ct. 1316, 134 L. Ed. 2d 470 (1996), the Third Circuit presaged the *Varity* decision in the context of facts much like those here. The class of plaintiffs in *Unisys* was assured by company representatives that they would receive lifetime medical benefits following retirement. In fact, the company's ERISA summary plan description contained reservation clauses that purported to allow the company to terminate the benefits " 'at any time' and for 'any reason' ". *Id.* at 1257. The *Unisys* plaintiffs argued that even if the reservation of rights clause gave the company the legal right to terminate benefit plans for its retirees, the company had breached its fiduciary duty by affirmatively misleading plan participants regarding the duration of their retiree medical benefits. *Id.* at 1259. In a variety of communications with potential retirees the company had described its retiree benefits as being "for life", without noting the reservation of rights language contained in the "formal" plan document. *Id.* The Third Circuit concluded:

> We have *no doubt* that the conduct Unisys engaged in . . . would constitute a breach of fiduciary duty in its most basic form. . . . [W]hen a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries.

Id. at 1264 (emphasis supplied).

The *Unisys* trial court had found that the claims of each of the class members were not identical: "some plaintiffs had stronger cases than others based on their specific inquiries and the information given to them personally." *Id.* at 1261 n. 8. The court rightly determined that this was no bar to class certification. It simply noted that such differences may make subclasses and possibly some individual hearings appropriate. *Id.*

The Eleventh Circuit has gone down an entirely different path. Though conceding the possibility that deceptive statements by an ERISA administrator may give rise to a claim of breach of fiduciary duty, the court neglected to accord recognition to the numerous written materials which were used by Delta's plan administrators to communicate misleading information to Petitioners, denigrating them as "informal company communications." The circuit court said:

> In *Alday*, this court stated in dicta that ERISA fiduciaries might not be insulated from liability on the basis of the formal written plan documents were contradictory and fraudulent promises are made in informal

> communications for the purpose of deceiving employees with respect to their benefits. . . . We voice no opinion as to whether the plaintiffs could state a claim under such circumstances. Even if they could, none of the evidence of record to date, which consists solely of informal company communications, supports the plaintiffs' allegations that they were assured that the terms of their medical coverage would never change. With this records as our only source of information, we can find no abuse of discretion by the district court in denying class certification . . . .

[App. 32a-33a (footnotes omitted)].

It is difficult to imagine a more official set of retirement planning communications than those at issue here. As described above, the documents which Petitioners have presented feature a memorandum distributed to all of Delta's U.S. personnel by the person serving as the company's Senior Officer for personnel benefits and Chair of the Administrative Committee for all company-sponsored ERISA plans, a memorandum from the Assistant Vice President - Personnel Benefits which supervisors were directed to disseminate to their departments, and the company's centralized compilation of official policies known as "Delta Standard Practices." As a practical matter, how else was the company to communicate with its employees? And if courts are to deem communications like these as legally irrelevant, is this not an open invitation for companies to knowingly mislead employees?

By dismissively referring to the key standardized company memoranda cited by Petitioners as "informal company

communications", the Eleventh Circuit has endorsed a substantive view of ERISA which stands in absolute opposition to the third circuit's analysis in *Unisys*. Both views cannot possibly co-exist, and a resolution of the conflict by this Court is essential. In the present case, the eleventh circuit's misinformed analysis as to what constitutes a breach of fiduciary duty claim under ERISA is directly responsible for its decision on "commonality."

III. In Affirming the Denial of Petitioners' Motion for Class Certification on their ERISA Claims, the Eleventh Circuit Applied Criteria for Class Certification that are Sharply in Conflict with the Decisions of Other Circuits in Parallel Cases.

A grant of certiorari is necessary to accord ERISA plaintiffs desperately needed uniformity between the circuits regarding the availability of the critical tool of class action. Schisms between the circuits on substantive and procedural matters under ERISA defeat the national uniformity that was one of the primary goals behind the statute's adoption.

Federal Rule of Civil Procedure 23(a) establishes four prerequisites for class action suits: numerosity, common questions of law or fact, typicality, and adequacy of representation. The Eleventh Circuit concluded that the Petitioners' claims lacked commonality because the issues presented by their claims included whether they had relied to their detriment upon the defendants' false assurances. 90 F.3d at 457.

In a number of circuits, large groups of retirees with ERISA claims against a common employer have routinely been allowed to press these claims in a class action. *See, e.g., In re American Medical Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996); *Forbush*

v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993); *cf. In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255, 1257 (3rd Cir. 1995) (ERISA plaintiff class certified). For example, in *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993), the Fifth Circuit reversed a district court's denial of class certification, despite the fact that the potential class was covered by four different pension plans, reasoning that, "the commonality test is met when there is 'at least one issue whose resolution will affect all or a significant number of the putative class members.' "[5]

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5. A number of district courts which have considered whether the commonality and typicality requirements were satisfied where questions of reliance were raised have reached the same result. *See, e.g., Smith v. MCI Telecommunications Corp.*, 1990 W.L. 58708 (D. Kan.); *Johnson v. Midland Career Institute*, 1993 W.L. 420954 (N.D. Ill.); *Kenavan v. Empire Blue Cross and Blue Shield*, 1993 W.L. 128012 (S.D.N.Y.) ("On a motion for class certification, 'individual questions of reliance should not defeat the common law claims of the class members who did so rely.'"); *Seiler v. E. F. Hutton & Co., Inc.*, 102 F.R.D. 880, 888-889 (D.N.J. 1984); *McMahon Books, Inc. v. Willow Grove Associates*, 108 F.R.D. 32 (E.D. Pa. 1985) ("The common core of across-the-board representations and the confirmation of business terms (CBT), suggest that class certification would be appropriate. . . . The separate negotiations [on leases] suggest there may be material variations in mass representations made to the individual tenants. Plaintiffs contend, however, that the oral representations made to the individual tenants were all essentially the same and that the defendants had a single sales pitch they gave to each perspective tenant. On the basis of the current record, the alleged misrepresentations, both written and oral, appear to be similar for each tenant."); *Zacharjsasz v. Lomas and Nettleton Co.*, 1988 W.L. 54066 (E.D. Pa.) ("Typicality does not denote identicality; rather, according to the Third Circuit, the typicality requirement entails the inquiry into whether or not the named plaintiffs' own circumstances are markedly different or the legal theory upon which the claims are based differs from that upon which the claims of the other class members are based. [Cits.] While each class member separately applied for a mortgage, was a party to unique conversations, and may not have tendered a commitment fee with the application, I cannot say that the

(Cont'd)

The Eleventh Circuit, however, seeks to hold the ERISA petitioners here to a sharply different and impossibly high standard for class certification. Addressing Petitioner's breach of fiduciary duty claim, it affirmed the denial of Petitioners' motion for class certification with regard to their ERISA-based claims on the basis that the claims "were not susceptible to class-wide proof" [App. 30a-31a], reasoning that even if the Petitioners proved that Delta was disseminating a false and uniform message to all potential retirees regarding its plans for future changes in its retirement benefits program, "they would also have to show that all members of the class would have deferred retirement" in reliance on the false information. The issue of reliance, the court said, is one which "would necessarily have been highly individualized for each potential retiree."[6]

The Eleventh Circuit's extraordinarily restrictive reading of the commonality requirement under Federal Rule of Civil Procedure 23(a) is not only wrong, but seriously impedes the ability of older employees with limited economic resources to vindicate claims falling within ERISA's exceedingly broad

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(Cont'd)

class representatives' pattern of dealings with defendant. . .markedly differs from the pattern of other class members' dealings with defendant."); *Tedesco v. Mishkin*, 689 F. Supp. 1327, 1335 (S.D.N.Y. 1988) ("It is also firmly established that the possibility of individual questions as to reliance and damages is not sufficient to deny class certification", citing *Green v. Wolfe Corp.*, 406 F.2d 291, 301 (2nd Cir. 1968), *cert. denied*, 395 U.S. 977 (1969)).

6. As noted above, the Eleventh Circuit's opinion reflects a belief that Counts II through IV of the Petitioners' complaint were based solely on deception regarding plans to offer a future retirement plan. This belief was flatly incorrect: Counts II and III are plainly based not only on Delta's false statements regarding its plans to offer a better early retirement plan in the near future but also on its false promises to protect Petitioners' medical insurance benefits from any reductions throughout their retirement. [R1-1].

preemptive reach.[7] Because the claims in *Sprague* are so strikingly similar to the claims presented here, the sixth circuit's discussion of class certification in *Sprague* is particularly instructive.[8]

The defendants in *Sprague*, like Delta, argued that no plaintiff class should be certified because Rule 23's commonality and typicality requirements were not met:

> General Motors claims that there was no single written or oral source of information common to all class members because there were tens of thousands of retirees who worked in dozens of different locations and retired over a fourteen-year period. Moreover, General Motors argues that the class members had different amounts of information, different sources of information,

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7. ERISA was explicitly designed to effect uniformity in the law of employee benefits. The replacement of a state law-governed patchwork quilt of employee benefits regulation with a uniform federal law was described by one of ERISA's legislative sponsors as "the crowning achievement of this legislation." *Shaw v. Delta Air Line, Inc.*, 463 U.S. 85, 99, 103 S. Ct. 2890, 2901, 77 L. Ed. 2d 490 (1983), *quoting* 120 Cong. Rec. 29197 (1974). A key congressional report endorsed proposed broad pre-emption provisions for ERISA, explaining that "'the Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded.' " *Id.*, 463 U.S. at 99 n. 20, 103 S. Ct. at 2901 n. 20 (1983), *quoting* H.R. Rep. No. 94-1785, p. 47 (1977); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987) ("A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them."); *see generally Varity Corp. v. Howe*, __ U.S. __, 116 S. Ct. 1065, 1070-71 (1996).

8. *Sprague*, *Varity*, and *Unisys* were all certified as class actions.

> and different individual understandings about the meaning of those communications. Because the communications varied according to the time of an individual's retirement, his or her plant, location, and the division involved, General Motors claims that the plaintiffs are not able to demonstrate commonality or typicality.

Id. at 1431.

The Sixth Circuit, however, had little difficulty rejecting this argument because "although the early retirees in the class certified by the district court retired at various times and received different information, they attack a system-wide modification by General Motors of their right to benefits and therefore satisfy Rule 23(a)(3)." *Id.* at 1433. The court found that the proposed class members "have several issues in common, including the predominant one of whether [their employer] offered certain benefits to induce them to retire early. . . . [T]he early retirees contend that the early retirement offer and their acceptance of it formed a separate binding contract. [This satisfies] the commonality requirement of Rule 23(a)(2)." *Id.* at 1432. The Sixth Circuit reasoned that " 'there need be only a single issue common to all members of the class.' . . . Where there is such a common issue, we have routinely permitted class action suits in the Employee Retirement Income Security Act context." *Id., quoting In re American Medical Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996).[9]

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9. The extraordinarily large amount at stake in *Sprague* and the significance of the case make it very likely that certiorari will soon be sought in the case. The Sixth Circuit opinion was rendered on August 14, 1996, nine days after the Eleventh Circuit rendered its decision here. The case is presently pending before the Sixth Circuit on motion for reconsideration. It

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Here, as in *Sprague,* the putative class members share the common issues of law and fact inherent in the question of whether their employer offered them misleading information regarding their retirement benefits in order to induce them to retire early. As in *Sprague,* Petitioners attack a system-wide modification by their employer of their right to benefits. The Complaint alleges and the evidence in this case undoubtedly demonstrates that Delta pursued a strategy of selling as many senior employees as possible on early retirement on or before January 1, 1993 by making the same, standardized pitch — if you retire prior to this date, you will be "grandfathered", and if you do not, your benefits will be severely downgraded. [R1-3, ¶¶ 39, 43-45]. Petitioners can not only demonstrate that Delta delivered a unified message to its employees, but they can also show the success of Delta's strategy. The rush of unprecedented numbers of employees into early retirement at the same time Delta was offering them the assurances at issue here is obviously no mere coincidence.

The Eleventh Circuit has imposed burdens to class certification in ERISA cases which Rule 23 was never intended to impose. There is no reason why the ERISA plaintiffs proceeding in the Eleventh Circuit should be effectively foreclosed from utilizing so critical a mechanism for the vindication of ERISA rights.

(Cont'd)

would be appropriate for this Court to consider this case in tandem with an appeal from the Sixth Circuit's decision in *Sprague. Sprague* was brought to the Eleventh Circuit's attention immediately after the Sixth Circuit's decision was rendered, but the Eleventh Circuit declined to address it.

CONCLUSION

Class certification is a vital tool in a case of this type -- a case in which the plaintiff class are retirees of modest means who suffer ongoing, indeterminate harm, and in which the defendant is a corporation with vast resources. Absent class certification, the only remedy for potential ERISA plaintiffs filing suit in this circuit would be to file suit individually. "Separate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts." *Kennedy v. Tallant,* 710 F.2d 711, 718 (11th Cir. 1983). *See also In re A. H. Robins Co.,* 880 F.2d 709, 732-40 (4th Cir. 1989). Even if a number of individuals could be joined in a single action, such an action would be a tremendous burden on the Court and highly unmanageable from the standpoint of conducting discovery and trial. And as Delta surely appreciates, such an individual case would be almost impossible to afford.

In the present case, there are literally almost two thousand people who retired from Delta between July 23, 1992 and January 1, 1993 based upon Delta's repeated representations that those accepting early retirement by January 1, 1993 would be "grandfathered" into their existing health benefits. They deserve to have their claims litigated in a manner which makes economic sense. The class action device of Rule 23 was designed to address precisely the situation before the Court. The Eleventh Circuit's denial of class certification based upon a supposed absence of commonality cannot be reconciled with the Sixth Circuit's opinion in *Sprague,* this Court's decision in *Varity,* the Third Circuit's decision in *Unisys,* and decisions of other courts. It would be a travesty if class certification were denied plaintiffs here simply because they filed their action within the Eleventh Circuit. Moreover, allowing the various circuits to continue down diametrically opposing jurisprudential paths sorely undermines the essential ERISA goal of nationwide uniformity.

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED SEPTEMBER 20, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8234

1:94 CV1296-GET

FELTON E. HUDSON; GEORGE DUNCAN; R. TEX RITTER; RUSS KING; GARY ROBERTS; *et al.*,

Plaintiffs-Appellants,

versus

DELTA AIR LINES, INC.; R.H. HEIL, in his official capacity as a member of the Delta Air Lines Administrative Committee; W. W. HAWKINS, in his official capacity as a member of the Delta Air Lines Administrative Committee; J. W. CALLISON, in his official capacity as a member of the Delta Air Lines Administrative Committee; C. J. MAY, in his official capacity as a member of the Delta Air Lines Administrative Committee, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

BEFORE: HATCHETT, Circuit Judge, HENDERSON, Senior Circuit Judge, and MILLS*, District Judge.

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* Honorable Richard H. Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

Appendix A

PER CURIAM:

The petition(s) for rehearing filed by Appellants' is DENIED.

ENTERED FOR THE COURT:

/s/ JOSEPH W. HATCHETT
UNITED STATES CIRCUIT JUDGE

APPENDIX B — PETITION FOR REHEARING DATED AUGUST 26, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 95-8234

FELTON E. HUDSON; GEORGE DUNCAN; R. TEX RITTER, et al.,

Appellants

versus

DELTA AIR LINES, INC.; R. H. HEIL, in his official capacity as a member of the Delta Air Lines Administrative Committee, et al.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

APPELLANTS' PETITION FOR REHEARING

* * *

I. INTRODUCTION

Appellants urge the Court to reconsider the decision issued in this case on August 5, 1996, for several clear reasons. First, the decision overlooks and fails to mention critical portions of the record by referring to what Delta has cited and nothing else.[1]

1. The opinion also reflects an unfamiliarity with the local rules of the Northern District of Georgia pertaining to the filing of class certification motions. *See* Slip op. at 3062, n. 16.

Second, the Court's opinion needlessly reaches out to consider and discuss the merits of issues not before the Court. Finally, the decision was issued without the benefit of and is in direct conflict with the recently-issued decision of the sixth circuit in the closely analogous case of *Sprague v. General Motors Corp.*, __ F.3d __, 1996 WL 455676, Appeal Nos. 94-1896, 94-1937, 94-1897 & 94-1898, (6th Cir. Aug. 14, 1996). The sixth circuit in a lengthy and well-considered opinion addressed *both* class action and merits issues and endorsed legal principles which are diametrically opposed to what this Court has done.

How this Court can approach this case as it has is inexplicable. Delta unquestionably presented its older, long-term employees with carrots and sticks to push them into retirement. The main stick was the threat that medical insurance benefits for retirees would drastically decrease for anyone who waited until after January 1, 1993 to retire. One carrot was a promise that those who retired by January 1, 1993 would receive enhanced medical insurance benefits relative to employees who stayed on — notwithstanding the major changes in health benefits for others. Those departing by the deadline would be "grandfathered" at Delta's expense. Delta's carefully scripted retirement seminars were clearly designed to sell senior employees on this early retirement program. Delta sweetened its sales pitch with assurances that retirees would "not retire *from* Delta but *with* Delta" and would remain part of the "Delta family". [*See* R2-26 at 5-6 & Exh. A] It closed the sale by offering anecdotes about situations in which Delta had extended more benefits than it was legally required to give to members of the "Delta family" and assuring potential early retirees that Delta had always regarded its retiree's benefits to be sacrosanct. *Id.*

The sales pitch worked like a charm. Thousands of senior

Appendix B

Delta employees believed what the company promised them and accepted the early retirement package. Unprecedented numbers of Delta employees accepted early retirement between the first announcement of the early retirement plan on July 23, 1992 and its conclusion on January 1, 1993. [R3-28-3-4]. In 1991, Delta had 419 retirees for the entire year. In the final three months in 1992, some 1,833 employees retired. In 1993 the number of individuals retiring again slowed to a trickle until a new special early retirement program (which Delta had previously said would never be offered) went into effect and a "second wave" of early retirees left the company.

Only a few months after they retired, it became clear that those led into retirement had been sold a bill of goods. By letter dated July 28, 1993, Delta announced it would begin charging them for a portion of their insurance premiums, with the threat of other significant changes to follow. In addition, despite the assurances they had been given in late 1992 that no subsequent special retirement package was on the horizon, an attractive early retirement package was offered in 1993.

The Court's opinion needs to be reexamined and reissued with a different result. At a minimum, the Court should modify the language of its opinion so as not to improperly prejudice plaintiff's case on the merits.

II. THE COURT'S DECISION OVERLOOKS CRITICAL PORTIONS OF THE RECORD

The Court's opinion focuses on the merits of this case. However, in its analysis, the Court inexplicably fails to even acknowledge the documentary evidence in the record that provides compelling support for appellants' claims. The official

communications issued from top-level Delta officials regarding the 1992 retirement offer are central to this case.

Imminent changes in Delta's medical insurance benefits for retirees were initially announced in a July 23, 1992 memo [R2-20, Ex. J] that was distributed to all of Delta's U.S. personnel by the Senior Vice President of Personnel.[2] This memo warned that medical insurance benefits for retirees would markedly change for those retiring after January 1, 1993. It stated, in part:

> Delta's current policy provides company paid medical coverage for nonpilot personnel who retire at or after age 52 with 30 years or more of service, or who retire at age 65 or later with at least 10 years of service. Personnel who retire with less than these required years of service currently pay a portion of the cost for their continued medical coverage following retirement. **Personnel retiring after January 1, 1993, and who retire prior to age 62, regardless of length of service, will be required to pay the full cost of their medical coverage from the date of their early retirement until the month in which they attain age 62. These monthly contributions will be subject to change based on Delta's medical plan costs. If**

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2. Delta's "Senior Vice President – Personnel" is its Senior Officer for personnel benefits and the Chairman of the Administrative Committee for all ERISA plans sponsored by the company. How on earth does the Court label the July 23 memo and the other documents cited herein as "informal communications"? See Slip op. at 3062. How else was Delta to communicate with its employees.

contributions are not made, coverage will be forfeited for the retiree and eligible family members (including survivors) both before and after age 62.

[R2-20, Ex. J at ¶ 12 (emphasis in original]

A key document is an October 5, 1992 Memorandum entitled "Clarification of Benefit Changes Effective January 1, 1993." The memo explained that it was prepared "because of the many questions we received" and "to allow adequate time to process these retirement requests in a timely manner." The October 5, 1992 [R2-20, Ex. L] memo was authored by the Assistant Vice President – Personnel Benefits and was sent to "All Department Heads and Management Personnel," who were advised therein that, "If you have personnel in your location who are considering retirement, *please be sure they are aware of these changes*." (Emphasis supplied). The attached memorandum explained that if a retirement-eligible employee did not retire on or before January 1, 1993, the "grandfather" provision would no longer apply. Benefits would thereafter change (and be subject to further change) and the retiree would be responsible for the payment of all premiums.

The October 5, 1992 Memorandum discusses both a service related contribution and a separate grandfather provision. As to the service related contribution, the memo states that such contributions "may apply if you retire early with less than 30 years of service or you retire at age 65 or older with less than 10 years of service."

The next paragraph in the memo summarizes the grandfather provision. It states:

Appendix B

> Those individuals who are active Delta employees on August 31, 1991 and who are 52 and older on January 1, 1992 were grandfathered. Those individuals who were grandfathered are not required to pay premiums regardless of their years of service provided they retire on or before January 1, 1993. No former Pan Am employees, only Delta service counts toward the service requirement for post retirement medical and dental benefits.

The following paragraph in the memo promoted the advantages of retiring on or before January 1. It provides:

> Those individuals who retire prior to or on January 1, 1993 *will retire with* the *current deductible* ($100 per individual/$300 per family), *out-of-pocket maximum* ($750 per individual/$1,500 per family) and the *carryover provision*. Also, *Medicare Part B reimbursement will continue for personnel who retire prior to or January 1, 1993.*

(Emphasis supplied).

The next section of the Memo outlined the ramifications of missing the January 1, 1993 deadline. It is clear that Delta was promising this group of early retirees that their medical insurance benefits (unlike those of subsequent retirees) would be "grandfathered", i.e., that they would be protected from future changes in medical insurance benefits. There is not one word in the October 5, 1992 memo to the effect that the "grandfather"

provision was really not a grandfather provision at all and could be rendered nugatory at any time. There was not one word about a "reservation of rights." From the standpoint of what Delta was seeking to accomplish, any such language would have been highly counterproductive.

The Delta assurances upon which the appellants relied were affirmed in the most standardized document of all — the company's centralized compilation of official policies known as "Delta Standard Practices." Delta's Standard Practices are routinely used as a reference by all the company's employees in their day to day work. Delta's Standard Practice 1032.3 provides in pertinent part:

> If the employee was employed by Delta prior to August 16, 1991 and is at least 52 years of age by January 1, 1992, *the employee and any eligible family members will continue to be provided full company-paid medical/ dental coverage during retirement*, regardless of length of service. (*Former Pan Am personnel are not included in this grandfather provision.*)

[R3-27, Def. Ex. 19 to Ex. 3 at 4 (Emphasis supplied)]. This Standard Practice remained in force *throughout* 1992. The "grandfather provision" speaks for itself — if the employee met the stated criteria, he and his family would "continue to be provided full company-paid medical/dental coverage during retirement . . ."

Other standardized postings were also clearly intended to stress the benefits of retiring on or before January 1, 1993 and

the severe impact of remaining with the company. [R2-20, Ex. K]. In these documents, the phrase "Grandfather provision still applies" appears prominently under the "Retirement Prior to January 1, 1993" and "Retirement on January 1, 1993" rubrics. Again, no language of any kind can be found in the document alerting the employee that the "grandfather" provision Delta was offering to its employees was in fact illusory. Other documents — all emanating from Delta's Personnel Department — reiterated the same message [R2-20, Ex. K] as did Delta's well-scripted pre-retirement seminars and "Benefits Hotline."

By omitting reference to any of this, the Court's opinion gives the reader a distinct misimpression of what this case is about. Appellants urge the Court to fairly examine these documents now and realistically assess the impact they would have had upon the Delta employees who left the company en masse during the latter half of 1992 and how they bear on "commonality" and "typicality". Almost two thousand employees abruptly retired in their highest income producing years, giving up not only immediate income, but very significant pension accumulations as well. It is obvious that these long term employees would not have flocked in droves to retirement at such a cost unless they believed that they were being promised something very meaningful. These people deserve to have the documents central to their employment decision fairly considered by the Court, not simply the documents cited by Delta.

The Court's opinion comments on the absence of the formal welfare benefit plan documents from the record. (Slip op. at 3061) These documents were not included in the record because this is not a case in which retirees are attempting to simply

enforce the terms of a Summary Plan Description.[3] This is, instead, a case in which the claims are based upon theories of bilateral contract and breach of fiduciary duty based upon fraud. The bilateral contract claim is patterned upon the cause of action recognized in *Sprague v. General Motors Corp.*, 843 F. Supp. 266 (E.D. Mich. 1994), and now expressly approved by the sixth circuit. *See* Section III, *infra*. The breach of fiduciary duty claims are founded in part upon the exception this Court referenced in *Alday v. Container Corp.*, 906 F.2d 660, 666 n. 15 (11th Cir. 1990) — where "a fiduciary [makes] fraudulent promises in informal communications that deceive employees and contradict the terms of the SPD." *See also Varity Corp. v. Howe*, __ U.S. __, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996); *In re Unisys Corp.*, 57 F.3d 1255 (1995). Under such circumstances, the ERISA fiduciary is subject to liability.

Each of these claims is based in significant measure upon the documents described above, documents which were uniformly distributed throughout Delta's rank by its top personnel and ERISA administrators. Even the company's oral representations regarding retirement benefits were made primarily at heavily scripted retirement planning seminars. These communal messages provided uniform assurances to all members of the putative class. Appellants do not simply rely on the fact that Delta intended to convey a common *message*. They have also demonstrated that Delta communicated that message largely through standardized documents and speeches. Such evidence clearly meets the commonality and typicality requisites of Rule 23(a).

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3. In 1992, Delta inserted for the first time a "reservation of rights" clause in its Benefits Handbook. No indication was given in the 1992 "reservation" that it was intended to apply to retirees. This was only done the *following* year, after those who had been led into retirement via the "grandfather" promise had already left.

Appendix B

III. THE COURT'S DECISION IS FUNDAMENTALLY INCONSISTENT WITH AND MUST BE REASSESSED IN LIGHT OF THE AUGUST 14, 1996 DECISION OF THE SIXTH CIRCUIT IN THE CLOSELY ANALOGOUS CASE OF SPRAGUE V. GENERAL MOTORS

Very shortly after the Court issued its decision on August 5, 1996 the sixth circuit issued a lengthy opinion in the appeal in *Sprague v. General Motors Corp.*, 843 F. Supp. 266 (E.D. Mich. 1994), upon which Count I of the Complaint is patterned. *See* Appellants' Brief at 2 & 20. The persuasive reasoning set forth by the sixth circuit in *Sprague* compels class certification here.[4] *See Sprague v. General Motors Corp.*, __ F.3d __, 1996 WL 455676, Appeal Nos. 94-1896, 94-1937, 94-1897 & 94-1898, (6th Cir. Aug. 14, 1996).

In its recent decision, the sixth circuit pointedly rejected objections to class certification that are virtually identical to those raised by the appellees — and relied upon by the Court — in this case. *Sprague v. General Motors Corp.*, 1996 WL 455676, (6th Cir. Aug. 14, 1996) (slip op. at 3-6). The sixth circuit held that the plaintiffs in the case had demonstrated sufficient commonality to justify class certification because "although the early retirees in the class certified by the district court retired at various times and received different information, they attack a system-wide modification by General Motors of their right to benefits and therefore satisfy Rule 23(a)(3)." *Id.* at 6. Here, as in *Sprague*, the proposed class members "have several issues in

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4. The sixth circuit's decision in *Sprague* also strongly supports the merits of appellants' claims. The court held that facts dramatically similar to those presented in this case could sustain both a bilateral contract claim for promised retirement benefits and a breach of fiduciary duty claim. *Sprague*, 1996 WL 455676, slip op. at 12-14 & 16-18.

common, including the predominant one of whether [their employer] offered certain benefits to induce them to retire early. . . . [T]he early retirees contend that the early retirement offer and their acceptance of it formed a separate binding contract. [This satisfies] the commonality requirement of Rule 23(a)(2)." *Id.* Moreover, as noted by the sixth circuit, and explained in the prior briefs of the appellants, " 'there need be only a single issue common to all members of the class.' . . . Where there is such a common issue, we have routinely permitted class action suits in the Employee Retirement Income Security Act context." *Sprague*, 1996 WL 455676, slip op. at 4, *quoting In re American Medical Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996); *see also Forbush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993) (reversing district court's denial of class certification, despite fact that the potential class was covered by four different pension plans).

The sixth circuit's holding is not only made in the context of claims that closely resemble the claims made here but is consistent with numerous decisions by other courts on this point. Appellants cited a number of these decisions in their briefs. *See* Brief of Appellants at 18-20, *citing Smith v. MCI Telecommunications Corp.*, 1990 W.L. 58708 (D.Kan.); *Johnson v. Midland Career Institute*, 1993 W.L. 420954 (N.D.Ill.); *Kenavan v. Empire Blue Cross and Blue Shield*, 1993 W.L. 128012 (S.D.N.Y.); *Seiler v. E. F. Hutton & Co., Inc.*, 102 F.R.D. 880, 888-889 (D.N.J. 1984); *McMahon Books, Inc. v. Willow Grove Associates*, 108 F.R.D. 32 (E.D.Pa. 1985); *Zacharjsasz v. Lomas and Nettleton Co.*, 1988 W.L. 54066 (E.D.Pa.); *Tedesco v. Mishkin*, 689 F. Supp. 1327, 1335 (S.D.N.Y. 1988). These decisions, however, were not discussed or distinguished in this Court's decision.

Appendix B

Appellants urge the Court to consider the thorough and well-reasoned appellate decision in *Sprague* and to give renewed consideration to the decisions noted in the preceding paragraph in light of the sixth circuit's analysis. Class certification is a vital tool in a case of this type — a case in which the putative plaintiffs are retirees of modest means who suffer ongoing, indeterminate harm, and in which the defendant is a corporation with vast resources. Absent class certification, the only remedy for thousands of people would be file suit individually. "Separate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts." *Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983). See also *In re A. H. Robins Co.*, 880 F.2d 709, 732-40 (4th Cir. 1989). Even if many could be joined in a single action, such an action would be a tremendous burden on the Court and highly unmanageable from the standpoint of conducting discovery and trial.

In the present case, there are literally almost two thousand people who retired from Delta between July 23, 1992 and January 1, 1993 based upon Delta's repeated representations that those accepting early retirement by January 1, 1993 would be "grandfathered" into their existing health benefits. They deserve to have their claims litigated in a manner which makes economic sense. The class action device of Rule 23 was designed to address precisely the situation before the court.

Denial of class certification based upon a supposed absence of commonality and typicality is simply wrong. The sixth circuit's opinion in *Sprague* confirms that this Court has rendered a decision dramatically out of step with other courts and heretofore well-established principles under Rule 23. It would be a travesty if class certification were denied plaintiffs here simply because they filed their action within the eleventh circuit.

IV. THE COURT'S DECISION INAPPROPRIATELY REACHES OUT TO CONSIDER ISSUES NOT BEFORE THE COURT

Instead of confining itself to the merits of this interlocutory appeal, the Court's opinion unnecessarily reaches out to address the merits of the appellants' claims. This is an interlocutory appeal in which the district court's orders regarding commonality and typicality under Federal Rule of Civil Procedure 23 and dismissal of one claim are at issue. The issue of the sufficiency of the evidence is not before the Court. The panel repeatedly admonished both counsel at oral argument to remember the limited scope of the interlocutory appeal and to refrain from addressing the merits of the underlying claims. Yet, in its opinion, the Court does precisely what it told counsel was inappropriate.

This interlocutory appeal was filed at a time when discovery was not yet complete. Appellants, unlike Delta, refrained from making improper efforts to present to the Court materials gleaned from subsequent discovery that were not contained in the record on appeal. No motion for summary judgment has been made in the district court nor has the district court issued any decision on the merits of appellants' ERISA claims. Under these circumstances, the type of discussion contained in the opinion regarding the likely merits of the ERISA claims was sorely premature.

The Court's commentary on the merits of the claims asserted in this case is particularly inappropriate because the substantive legal area involved, ERISA, is one which is continuing to undergo significant and rapid doctrinal development and refinement. During the past year alone the United States Supreme Court has issued its opinion in *Varity Corp. v. Howe*, 116 S. Ct. at 1065, which helped define the doctrine of fiduciary

obligations in the ERISA class actions context, not to mention the many ERISA decisions issued by federal circuit and district courts. *Sprague* was issued less than ten days after this Court's decision herein. The next year or two will undoubtedly be marked by major developments in ERISA jurisprudence, developments which might significantly develop the law in this circuit and render the Court's analysis of the merits completely inconsistent with governing precedent. To so severely constrain development of the substantive law in this action is unnecessary and inappropriate. Appellants accordingly urge the Court to strike from its opinion the portions which address the merits of the appellants' underlying ERISA claims and simply address the issues presented by the district court's opinion.

V. THE COURT'S DECISION OVERLOOKS APPLICABLE LOCAL RULES OF THE DISTRICT COURT

The Court's decision also indicates that appellants filed their motion for class certification too early in the litigation. (Slip op. at 3062-63 n. 13) The Court is respectfully advised that the Local Rules of the Northern District of Georgia *require* parties seeking class certification to file their motion early in the litigation. Specifically, Local Rule 300-2, N.D. Ga. provides:

> The plaintiff shall within 90 days after the complaint is filed move for determination under F.R.Civ.P. 23(c)(1) as to whether the suit may be maintained by class action. The court may extend the time upon a showing of good cause.

Appellants filed their Motion one working day before the deadline established under the Local Rules.

VI. CONCLUSION

For all of the foregoing reasons, as well as those set forth in Appellants' prior briefs on appeal, appellants ask this Court to reconsider its August 5, 1996 decision. The District Court's Order denying class certification is plainly incorrect and should be reversed.

Respectfully submitted, this 26th day of August, 1996.

s/ Larry H. Chesin
LARRY H. CHESIN
State Bar No. 123600

s/ Georgia Kay Lord
GEORGIA KAY LORD
State Bar No. 447932

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APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AUGUST 5, 1996

Felton E. HUDSON: George Duncan; R. Tex Ritter; Russ King; Gary Roberts; Neil Rowe; John D. Wallace; Ella Mae Williams; Betty Hofele; Ed Miller; Charles Chambers; Frank Lynch; Joseph Carrabino; James S. Brown, Jr.; Jerry Lilly; George Bailey; Jim Peoples; W. Travis Whitaker; Carolyn Cassell; Joseph P. McDaniel; Gary Robinson; Ernie Pariseau, on behalf of themselves and all those similarly situated, Plaintiffs-Appellants.

v.

DELTA AIR LINES, INC.; R.H. Heil, in his official capacity as a member of the Delta Air Lines Administrative Committee; W.W. Hawkins, in his official capacity as a member of the Delta Air Lines Administrative Committee; J.W. Callison, in his official capacity as a member of the Delta Air Lines Administrative Committee; C.J. May, in his official capacity as a member of the Delta Air Lines Administrative Committee; R.A. McClelland, in his official capacity as a member of the Delta Air Lines Administrative Committee; T.J. Roeck, in this official capacity as a member of the Delta Air Lines Administrative Committee; C.A. Thompson, in his official capacity as a member of the Delta Air Lines Administrative Committee; Robert S. Harkey, in his official capacity as a member of the Delta Air Lines Administrative Committee; Maurice Worth, in his official capacity as a member of the Delta Air Lines Administrative Committee; H.D. Greenberg, in his official capacity as a member of the Delta Air Lines Administrative Committee; R.W. Coggin, in his official capacity as a member of the Delta Air Lines Administrative Committee; W.R. Brahm, in his official capacity as a member of the Delta Air Lines Administrative Committee, Defendants-Appellees.

Appendix C

No. 95-8234.

United States Court of Appeals,
Eleventh Circuit

August 5, 1996.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before HATCHETT, Circuit Judge, HENDERSON, Senior Circuit Judge, and MILLS*, District Judge.

PER CURIAM:

This is an interlocutory appeal from the order of the United States District Court for the Northern District of Georgia denying the plaintiffs' motion for class certification and dismissing a pendent state law claim of rack of jurisdiction.[1] We affirm.

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* Honorable Richard H. Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

1. This court granted the plaintiffs' petition for interlocutory review pursuant to 27 U.S.C. § 1292(b), which permits appeals to be taken in civil cases from decisions not otherwise appealable when the district court certifies that the "order involves a controlling question of law as to which there is susbstantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the ligitation." 28 U.S.C. § 1292(b).

Appendix C

I. BACKGROUND

The plaintiffs are former employees of Delta Air Lines, Inc. ("Delta"), who retired between July 23, 1992 and January 1, 1993. On May 16, 1994, they commenced this action against Delta and various Delta officials based upon alleged violations of the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), and also asserting a state law breach of contract cause of action. On June 3, 1994, they filed an amended complaint to add certain defendants. According to the allegations of the complaint,[2] the facts giving rise to the lawsuit are as follows.[3]

On July 23, 1992, Delta announced impending changes in the medical insurance benefits plan provided by the company for its employees and retirees.[4] Employees were told that those who retired after January 1, 1993 would receive reduced benefits and be required to pay higher premiums than persons who retired prior to that date. In subsequent weeks, the company disseminated further information, both orally and in writing, which stated that individuals who retired on or before January 1, 1993, would be "grandfathered" with respect to their current medical benefits, meaning, they would be entitled to the same

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2. We refer to the amended complaint as the complaint.

3. At this preliminary stage of the case and for purposes of this appeal, we must treat the allegations of the complaint as true.

4. A notice issued to "All Members of the Delta Family" stated that, due to adverse economic forces and to avoid "downsizing," it was necessary for the airline to substantially and permanently reduce its costs, which, among other things, would require revision of the company-provided medical and dental benefits package. (R2-20, Exhibit 1).

level of coverage throughout the course of their retirement and would not be affected by any future changes in the medical insurance plan offered by the airline. In addition, Delta assured its employees that it did not intend at that time to offer any package of enhanced retirement incentives in the future. The latter declarations were made orally during retirement planning seminars conducted by the company and "in numerous conversations with potential Delta retirees." (R1-3 at ¶ 45).

The complaint further alleged that the plaintiffs chose their retirement dates in reliance on Delta's promises that their level of medical coverage and premiums would remain constant throughout their retirement and that no improved retirement package was in the planning stage at the time they made their decision. After they retired, however, the company reduced the level of their medical benefits and required them to pay higher premiums for coverage. Also, contrary to the statements made denying a plan to offer an enhanced benefits package in the future, retirement terms more favorable than those extended to the plaintiffs were contemplated by the airline prior to January 1, 1993 and in fact were offered to certain eligible employees on August 23, 1993 (hereinafter referred to as the "Special Retirement Plan").

These allegations formed the basis for the first four counts of the complaint. Count I urged that, when the plaintiffs retired on or before January 1, 1993, they entered into a bilateral contract with Delta, enforceable under ERISA, which mandated that the company continue to provide the same medical benefits package to the plaintiffs throughout their retirement years. Count II asserted that by making false assurances to the plaintiffs regarding the continuation of the terms of their retirement benefits and by denying the intention to offer the Special

Retirement Plan in the future, Delta breached its fiduciary duty to the plaintiffs in violation of ERISA. Count III charged that Delta fraudulently induced the plaintiffs to retire on or before January 1, 1993 for the purpose of preventing their participation in the Special Retirement Plan. Count IV claimed that by falsely informing the plaintiffs that no better retirement package would be forthcoming after January 1, 1993, and then extending such a package to subsequent retirees, Delta unlawfully discriminated against certain benefits plan participants in favor of others, contrary to ERISA.

In addition to the ERISA causes of action contained in Counts I through IV, Count V or the complaint alleged a suit for breach of contract under Georgia law. This claim was predicated upon allegations that Delta made repeated promises to the plaintiffs during their employment that retirees who were at least fifty-two years' old and who had worked for the airline for at least ten years would be entitled to certain flying privileges throughout their retirement. However, on October 26, 1993, the company eliminated flight privileges for any retiree who had accepted employment with another airline or affiliate.

On August 12, 1994, the plaintiffs moved for class certification pursuant to Fed. R.Civ.P. 23. In a brief in support of the motion, the plaintiffs identified the putative class as over 1,800 "former employees of Delta Air Lines, Inc., who retired from employment at Delta Air Lines between the dates of July 23, 1992 and January 1, 1993 inclusive." (R1-11, Brief at 2). The plaintiffs alleged that the causes of action set forth in Counts I through V of the complaint could best be pursued in the form of a class action because, *inter alia,* they involved common issues of law and fact and the claims of the class representatives were typical of those of the class as a whole.

Thereafter, the defendants moved to dismiss Count V of the complaint for lack of subject matter jurisdiction on the ground that it was unrelated to the federal ERISA claims asserted in Counts I through IV and lacked the requisite diversity of citizenship. The defendants also opposed class certification, contending in part that the ERISA claims were not amendable to class-wide proof because they turned on each retiree's individual reliance on the alleged assurances made by Delta. Furthermore, the defendants argued, the requirements of commonality and typicality necessary for class certification were not met because the claims depended, all or in part, upon a variety of alleged oral representations, thereby necessitating proof of the particular statements made to each retiree.[5] The defendants conceded that "if Plaintiff's claims were based on uniform written documents received and relied on by the entire class, commonality and typicality could be present." (R2-16 at 36). They maintained, however, that the plaintiffs failed to carry their burden of proof on this score because they offered no evidence that Delta ever issued such uniform written assurances.

The plaintiffs then filed a reply to the motion to dismiss Count V and to the defendants' opposition to class certification. In support of the latter issue, the plaintiffs submitted, *inter alia,* copies of a newsletter disseminated by Delta to it employees and several intracompany memorandums, all of which discussed the changes in the medical benefits plan effective January 1, 1993.[6]

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5. According to the allegations of the complaint, Count I was based upon oral and written representations. The claims involving the Special Retirement Plan resulted solely from alleged oral promises.

6. The evidence submitted by the plaintiffs included company (Cont'd)

Appendix C

In an order dated November 4, 1994, the district court granted the defendants' motion to dismiss Count V for lack of jurisdiction and denied the plaintiffs' motion for class certification. With respect to Count V, the court found that the requirements for supplemental jurisdiction under 28 U.S.C. § 1367 were not present because the state law claim alleged therein did not sufficiently involve the same facts, occurrences, witnesses or evidence as the federal ERISA claims and it was separately maintainable from the ERISA counts. On the issue of class certification of the ERISA causes of action, the court found that the plaintiffs failed to furnish proof rising to the level imposed by federal law which would demonstrate commonality and typicality. In particular, the court stated that the plaintiffs

> have not shown that the questions of fact in each affected retiree's case are common to any other retiree's case. According to the plaintiffs, Delta made the representations that are at issue in this case orally, during several retirement planning seminars, and in writing, in various mailouts and fliers posted on bulletin boards. Plaintiffs must show not

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(Cont'd)

memorandums dated both before and after January 1, 1993. (*See generally* R2-20, Exhibits). Only the newsletter, which was dated August 27, 1992, and those memorandums issued prior to January 1, 1993 could have affected the timing of the plaintiffs' retirement. An affidavit of one of the plaintiffs, Felton E. Hudson, was also proffered. It states that "[s]uch memos were posted on company bulletin boards." (*Id.* at Exhibit B, ¶ 6). No objections to the inclusion of this evidence in the record were made by Delta. We presume that it is properly before us.

> only whether each retiree was aware of these representations, but more importantly, the extent to which each retiree relied on the alleged representations in making his or her retirement decision. These are factual issues that must be resolved independently for each retiree.

(R2-24 at 8).

On November 21, 1994, the plaintiffs moved for reconsideration of the district court's order, or in the alternative, for the certification necessary to seek an interlocutory appeal in accordance with 28 U.S.C. § 1292(b). *See supra* note 2. The court denied the request for reconsideration, but did issue the § 1292(b) certification. This court subsequently permitted the appeal.[7]

II. STANDARD OF REVIEW

The district court's dismissal of Count V of the complaint for lack of subject matter jurisdiction is a question of law which is reviewed *de novo* on appeal. *McMillian v. FDIC*, 81 F.3d 1041, 1045 (11th Cir. 1996). We consider the court's denial of class certification under an abuse of discretion standard. *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d

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7. When the district court certifies that interlocutory review of an order is warranted, the court of appeals may, in its discretion, permit an appeal to be taken if application is made to it within ten days after entry of the district court's certification. 28 U.S.C. § 1292(b); *General Television Arts, Inc. v. Southern Ry. Co.*, 725 F.2d 1327, 1330 (11th Cir. 1984).

1566, 1569 (11th Cir. 1992); *Coon v. Georgia Pacific Corp.*, 829 F.2d 1563 1565 (11th Cir. 1987).

III. DISCUSSION

A. *Dismissal of Count V.*

We first address the district court's dismissal of Count V for lack of subject matter jurisdiction. There is no question in that case that diversity of citizenship does not exist, thus, subject matter jurisdiction over the state law allegations in Count V depends upon the existence of that aspect of supplemental jurisdiction formerly known as pendent claim jurisdiction. *See Palmer v. Hospital Auth. of Randolph County,* 22 F.3d 1559, 1566 (11th Cir.1994). The presence of supplemental jurisdiction is governed by 28 U.S.C. § 1367. Subsection (a) of that statute defines the power of the federal courts to hear supplemental claims. *Palmer,* 22 F.3d at 1566. It provides in relevant part that

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). The district court had original jurisdiction (in this case, federal question jurisdiction) over the ERISA counts. The court's power to adjudicate Count V therefore turns on whether the state law cause of action alleged therein is so

related to an ERISA ground that they form part of the same case or controversy. In deciding whether a state law claim is part of the same case or controversy as a federal issue, we look to whether the claims arise from the same facts, or involve similar occurrences, witnesses or evidence. *Palmer,* 22 F.3d at 1566.

We agree with the district court that Count V of the complaint does not arise from the same case or controversy as the ERISA causes of action. The record shows that the flight privileges at issue in Count V were not part of an ERISA benefits plan and were administered by a different department of Delta. Moreover, the alleged facts underlying Count V are completely unrelated to the allegations in support of the ERISA claims. The only factor they share in common is that the airline's decisions with respect to ERISA benefits and flight benefits affected certain retirees. This does not provide a sufficient nexus between the federal and state causes to support supplemental jurisdiction. We consequently affirm the dismissal of Count V. In so doing, we necessarily find that the issue of class certification as to Count V is moot.

B. *Denial of Class Certification.*

Next, we consider the district court's denial of class treatment of Counts I, II, III and IV, the ERISA grounds. Class certification is governed by Fed.R.Civ.P. 23. Rule 23 permits the maintenance of a class action when (1) the class is so numerous that joinder of all of its members is impracticable, (2) questions of law or fact common to the class are present, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will sufficiently protect the interests of the class.

Fed.R.Civ.P. 23(a).[8] The burden of proving these prerequisites is on the representative party or parties seeking class certification. *Gilchrist v. Bolger*, 733 F.2d 1551, 1556 (11th Cir.1984); *Nelson v. United States Steel Corp.*, 709 F.2d 675, 678-79 (11th Cir.1983).

As stated earlier, the district court's decision to deny class certification was based upon the absence of commonality and typically. These factors provide the necessary link between the class representatives and the class members. *Washington*, 959 F.2d at 1569 n.8. Although the issues of commonality and typicality are separate inquires, proof of each also "tend[s] to merge." *Id.*

The plaintiffs contend that commonality and typicality are present with respect to Count I because, although they and the putative class members received the alleged assurances through

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8. If the requirements of Fed.R.Civ.P. 23(a) are met, the district court must go further and determine whether the facts before the court satisfy Fed.R.Civ.P. 23(b). That subsection provides that class actions are appropriate only when (1) the prosecution of separate actions would create a risk of inconsistent verdicts or where invididual adjudications would, as a practical matter, be dispositive of the interests of class members who are nonparties; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the putative class such that declaratory or injuctive relief with respect to the class as a whole would be appropriate; or (3) questions of law or fact common to members of the class predominate over issues affecting individual members and class adjudication is preferable to other methods of litigation for purposes of a fair and efficient resolution of the controversy. Because the district court found that the Rule 23(a) prerequisites of commonality and typicality were not present, it did not reach the Rule 23(b) issue. Our review on appeal is therefore confined to the district court's subsection (a) determination.

different media and from different sources, the airline issued a uniform message to all employees concerning the terms of their future medical benefits plan, which depended on their retirement on or before January 1, 1993. Likewise, they claim, Delta issued identical information to all members of the putative class concerning the Special Retirement Plan, that is, that no such plan was contemplated for a later date.

In response, the defendants essentially argue that the ERISA claims have no merit. They maintain that Delta reserved the right to amend or discontinue the plaintiffs' medical benefits at any time.[9] Thus, the defendants insist that the plaintiffs cannot prove, class-wide or otherwise, the formation of the purported bilateral contract alleged in Count I. In addition, the defendants reiterate that evidence of individual reliance on a variety of purported oral representations is necessary with respect to all of the ERISA counts and state that, consequently, each plaintiff's claims must be determined on a case-by-case basis.

We stress initially that the merits of the plaintiffs' claims are not before us. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 2153, 40 L.Ed.2d 732, 749 (1974) (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir.1971) (" 'In determining the propriety of a class action, the

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9. In support of this assertion the defendants refer to a statement contained in a supplement to Delta's benefits handbook, which described changes in post-retirement medical and dental benefits effective January 1, 1992. The supplement states, "[a]s always, Delta reserves the right to change, modify, amend or discontinue the benefits described in this supplement of the Benefits Handbook at any time." (Appendix of Appellees, Tab A, Exhibit 2; *See also id.* at Tab J, Exhibit 77). This evidence was not made a part of the record in the district court. Consequently, we do not consider it on appeal.

question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.' "). Nevertheless, "evidence relevant to the commonality requirement is often interwined with the merits." *Nelson,* 709 F.2d at 679. Accordingly, it sometimes is necessary to "to probe behind the pleadings before coming to rest on the certification question." *General Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740, 752 (1982).

The issue of commonality with respect to the Count I contract claim is fundamentally different than the commonality that must be shown to support class certification of the Special Retirement Plan allegations described in Counts II through IV. We find that the claims relating to the Special Retirement Plan are not suspectable to class-wide proof. Even if the plaintiffs are able to prove that Delta disseminated a false and uniform message to all potential retirees that no such plan was in the works at the time they made their decision to retire, they would also have to show that all members of the class would have deferred their retirement in the hope that they would be eligible for the Special Retirement Plan to be offered in the future.[10]

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10. The evidence contained in the record regarding the Special Retirement Plan discloses that it was offered only to a select group of employees who were at least fifty-two years' old on November 1, 1993 and who worked in particular departments of the airline targeted for downsizing. Participation was also limited to a certain number of persons in those departments to fit the business needs of the airline. (R2-20, Exhibits E, F). There was no guarantee that persons eligible for the program would be allowed to enroll. If requests to retire under the plan exceeded availability, acceptance was based upon seniority. (*Id.*at Exhibit F). It is most unlikely that all members of the putative class were eligible to participate in the

(Cont'd)

This sort of decision would necessarily have been highly individualized for each potential retiree.

On the other hand, the merits of the Count I contract cause depend simply on evidence of the formation of the bilateral contract alleged therein. This will require proof of *written* plan documents which notified the putative class that the terms of their medical benefits plan would remain constant throughout their retirement if they retired on or before January 1, 1993.

> ERISA requires that welfare benefit plans be governed by written plan documents which are to be prepared and filed in compliance with ERISA's reporting and disclosure requirements. . . . Accordingly, any retiree's right to lifetime medical benefits at a particular cost can only be found if it is established by contract under the terms of the ERISA-governed benefit plan document.

Alday v. Container Corp. of America, 906 F.2d 660, 665 (11th Cir.1990) (citations omitted), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 675, 112 L.Ed.2d 668 (1991). This type of claim seems, on the surface, to be amendable to class-wide proof. So far, however, the plaintiffs have failed to demonstrate the existence of such written plan documents.[11] The plaintiff's reliance on

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(Cont'd)
program or would have delayed their retirement on the chance that they might be selected. In any event, the plaintiffs made no showing on this issue.

11. As noted earlier, the written documentation made a part of the record in support of the motion for class certification consists of a company newsletter and intracompany memorandums.

the alleged uniform oral statements guaranteeing the same level of medical benefits throughout their retirement is of no help because "there [is] no federal common law right to promissory estoppel under ERISA in cases involving oral amendments to or modifications of employee plans governed by ERISA."[12] *Id.* at 666.

In *Alday,* this court stated in dicta that ERISA fiduciaries might not be insulated from liability on the basis of the formal written plan documents where contradictory and fraudulent promises are made in informal communications for the purpose of deceiving employees with respect to their benefits. *Id.* at 666 n. 15. We voice no opinion as to whether the plaintiffs could state a claim under such circumstances. Even if they could, none of the evidence of record to date, which consists solely of informal company communications, supports the plaintiffs' allegations that they were assured that the terms of their medical coverage would never change.[13] With this record as our only

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12. A federal common law claim of equitable estoppel may come into play based upon oral interpretations of ambiguous ERISA plan documents. *Alday,* 906 F.2d at 666; *Kane v. Aetna Life Ins.,* 893 F.2d 1283, 1285-86 (11th Cir.), *cert. denied,* 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed.2d 192 (1990). "However, estoppel is not available either for oral modifications (as opposed to interpretations) or when the written plan is unambiguous." *Glass v. United of Omaha Life Ins. Co.,* 33 F.3d 1341, 1347 (11th Cir.1994). The plaintiffs do not allege in this case that the controlling ERISA plan documents were ambiguous.

13. The newsletter defined "grandfathered" persons as "includ[ing] those individuals who were Delta employees as of August 31, 1991 and were age 52 or older as of January 1, 1992." (R2-20, Exhibit H). It also stated that "[i]f you elect to retire early prior to age 62 on January 1, 1993, the early retirement medical and dental contribution will not apply. However, (Cont'd)

source of information, we can find no abuse of discretion by the district court in denying class certification as to Count I of the complaint.

Of course, if though further proceedings, the plaintiffs are able to clarify and better support the need for class certification, the district court remains free to revisit the issue.[14] The determination of whether a class should be certified should be made "[a]s soon as practicable after the commencement of an action." Fed.R.Civ.P. 23(c)(1). Additional discovery on the issue

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(Cont'd)
the service related contribution may apply if you were not part of the grandfathered group." *Id.* It is not clear from this language exactly what it meant to be "grandfathered." Moreover, although the evidence indicates that Delta told potential retirees that certain employee contributions would be waived for persons in the "grandfathered" group who retired on or before January 1, 1993, nothing in the record supports the plaintiffs' claims that they were also told that the particular type of medical benefits included in the ERISA plan would be provided in perpetuity.

14. For example, the plaintiffs may yet be able to produce written plan documents in support of Count I. We caution, however, that the documentation currently in the record indicates that Delta made certain differentiations among various groups of retirees depending upon an employee's age at retirement, years of service and whether some of that service was with another airline. Thus, even if class certification were appropriate, it might be necessary to define and provide for various subclasses. But, we also note that at this point the plaintiffs' case appears to be based solely upon a theory of promissory estoppel, which is not cognizable under ERISA. *Alday*, 906 F.2d at 666. If the plaintiffs are unable to state a claim for relief, any question as to class certification will be moot. *See id.* at 667.

and a hearing may be helpful.[15] *See Washington*, 959 F.2d at 1570-71. We leave any further development of the class treatment issue with respect to Count I to the sound discretion of the district court.[16] We simply hold that, at this stage of the proceedings, the district court did not abuse its discretion in denying class certification on the record before us.

IV. CONCLUSION

In accordance with the foregoing, we AFFIRM the dismissal of Count V for lack of subject matter jurisdiction, we AFFIRM the denial of the class certification with respect to Counts I, II, III and IV and we REMAND the case of the district court for further proceedings.

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15. Although a hearing is not required prior to granting or denying a motion for class certification, *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1099 (11th Cir.1996), such a procedure may, in an appropriate case, aid the court in deciding the issue.

16. Although the issue of class certification should be resolved in the early stages of a case if possible, prior discovery is often necessary to sufficiently define the proper scope of an alleged class or subclass. Here, the plaintiffs moved for class treatment prior to conducting any discovery, traveling solely on the broad allegations of the complaint. Such an approach may be acceptable in some cases, but this is not one of them. Because the entitlement to ERISA benefits is controlled by formal plan documents, the analysis of any claim arising from the alleged failure to comply with an ERISA plan must begin with an examination of those documents, which will also define the class or classes of persons governed thereby. The record in the present case shows that discovery began on August 17, 1994 and continued until March 22, 1995, when it was stayed by the district court pending the resolution of this appeal. The plaintiffs failed to make the pertinent ERISA plan documents a part of the record during this time. By suggesting that the district court may, in its discretion, reopen the class certification issue after further development of the case, we do not mean to imply that the court should do so.

APPENDIX D — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 5, 1996

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8234

District Court No. 1:94-01296-CV

FELTON E. HUDSON; GEORGE DUNCAN; R. TEX RITTER; RUSS KING; GARY ROBERTS; NEIL ROWE; JOHN D. WALLACE; ELLA MAE WILLIAMS; BETTY HOFELE; ED MILLER; CHARLES CHAMBERS; FRANK LYNCH; JOSEPH CARRABINO; JAMES S. BROWN, JR.; JERRY LILLY; GEORGE BAILEY; JIM PEOPLES; W. TRAVIS WHITAKER; CAROLYN CASSELL; JOSEPH P. McDANIEL; GARY ROBINSON; ERNIE PARISEAU, on behalf of themselves and all those similarly situated,

Plaintiffs-Appellants,

versus

DELTA AIR LINES, INC.; R. H. HEIL, in his official capacity as a member of the Delta Air Lines Administrative Committee; W. W. HAWKINS, in his official capacity as a member of the Delta Air Lines Administrative Committee; J. W. CALLISON, in his official capacity as a member of the Delta Air Lines Administrative Committee; C. J. MAY, in his official capacity as a member of the Delta Air Lines Administrative Committee; R. A. McCLELLAND, in his official capacity as a member of the Delta Air Lines Administrative Committee; T. J. ROECK, in his official capacity as a member of the Delta Air Lines

Appendix D

Administrative Committee; C. A. THOMPSON, in his official capacity as a member of the Delta Air Lines Administrative Committee; ROBERT S. HARKEY, in his official capacity as a member of the Delta Air Lines Administrative Committee; MAURICE WORTH, in his official capacity as a member of the Delta Air Lines Administrative Committee; H. D. GREENBERG, in his official capacity as a member of the Delta Air Lines Administrative Committee; R. W. COGGIN, in his official capacity as a member of the Delta Air Lines Administrative Committee; W. R. BRAHAM, in his official capacity as a member of the Delta Air Lines Administrative Committee,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before HATCHETT, Circuit Judge, HENDERSON, Senior Circuit Judge, and MILLS*, District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order dismissing Count V for lack of subject matter jurisdiction is hereby AFFIRMED; the order denying class certification with respect

* Honorable Richard H. Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

to Counts, I, II, III and IV be and the same is hereby AFFIRMED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 5, 1996
For the Court: Miguel J. Cortez, Clerk
By: s/ Matty Davidson
Deputy Clerk

ISSUED AS MANDATE: 10/10/96

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED JANUARY 11, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CASE NO. 1:94-cv-1296-GET

FELTON E. HUDSON; GEORGE DUNCAN R. TEX RITTER; RUSS KING; GARY ROBERTS; NEIL ROWE; JOHN D. WALLACE; ELLA MAE WILLIAMS; BETTY HOFELE; ED MILLER; CHARLES CHAMBERS; FRANK LYNCH; JOSEPH CARRABBINO; JAMES S. BROWN, JR. JERRY LILLY; GEORGE BAILEY; JIM PEOPLES; W. TRAVIS WHITAKER CAROLYN CASSELL; JOSEPH P. MCDANIEL; GARY ROBINSON; ERNIE PARISEAU, on behalf of themselves and all those similarly situated,

Plaintiffs

V.

DELTA AIRLINES, INC. and R. H. HEIL; W.W. HAWKINS; J.W. CALLISON; C.J. MAY; R.A. McCLELLAND; T.J. ROECK; C.A. THOMPSON; ROBERT S. HARKEY; MAURICE WORTH; H.D. GREENBERG; R.W. COGGIN; W.R. BRAHAM, each in his official capacity as a member of the Delta Airlines Administrative Committee

Defendants

Appendix E

ORDER

The above-styled matter is presently before the court on the plaintiffs' motion for reconsideration or, in the alternative, motion for certification under 28 U.S.C. § 1292(b) [docket no. 26].

Motion for Reconsideration

Plaintiffs move for reconsideration of the Court's November 4, 1994 Order denying plaintiffs' motion for class certification and granting defendants' motion to dismiss Count Five of the complaint for lack of subject matter jurisdiction. A motion for reconsideration should be filed only when, after careful consideration, it is deemed "absolutely necessary" by the movant. Local Rule 220-6. Such a motion may not be employed as a vehicle to tender new legal theories or to introduce new evidence that could have been presented in conjunction with the previously filed motion or response. Rather, motions for reconsideration serve the limited purpose of correcting manifest errors of law or fact, or in certain instances, calling newly discovered evidence to the Court's attention. Thus, the Court is most willing to reconsider a prior ruling on an issue in the face of new Eleventh Circuit or Supreme Court authority.

After reviewing the authorities cited in plaintiffs' motion for reconsideration, the Court adheres to the ruling set forth in its November 4, 1994 Order. Accordingly, plaintiffs' motion for reconsideration [docket no. 26-1] is hereby overruled and DENIED.

Appendix E

Motion for Certification

Plaintiffs also move for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) of the Court's November 4, 1994 Order. A district court may certify an interlocutory appeal under § 1292(b) where the court is satisfied that the order to be appealed involves "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation." *Id.*

The plaintiffs assert that there is substantial ground for difference of opinion on two issues that this court decided adversely to plaintiffs: (1) whether there are sufficient questions of law or fact common to the class to warrant class certification, and (2) whether plaintiffs, flight benefits claim forms part of the same case or controversy as their federal claims to allow the Court to exercise supplemental jurisdiction. Upon review of this Court's order, the facts of this action and the arguments advanced in the plaintiffs' instant motion, the court concludes that the requested certification is warranted. Accordingly, plaintiffs' motion for certification (docket no. 26-2) is GRANTED.

This Court's November 4, 1994 order is hereby amended to include a certification that the issues of class certification and the exercise of supplemental jurisdiction over plaintiffs' flight pass claim are controlling questions of law as to which there is substantial ground for a difference of opinion and that the immediate appeal of these issues will materially advance the ultimate termination of this litigation.

Appendix E

Summary

Plaintiffs, motion for reconsideration [docket no. 26-1] is DENIED. Plaintiffs' motion for certification [docket no. 26-2] is GRANTED.

SO ORDERED, this 11 day of January, 1995.

s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED NOVEMBER 4, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CASE NO. 1:94-cv-1296-GET

FELTON E. HUDSON; GEORGE DUNCAN R. TEX RITTER; RUSS KING; GARY ROBERTS; NEIL ROWE; JOHN D. WALLACE; ELLA MAE WILLIAMS; BETTY HOFELE; ED MILLER; CHARLES CHAMBERS; FRANK LYNCH; JOSEPH CARRABINO; JAMES S. BROWN, JR. JERRY LILLY; GEORGE BAILEY; JIM PEOPLES; W. TRAVIS WHITAKER CAROLYN CASSELL; JOSEPH P. MCDANIEL; GARY ROBINSON; ERNIE PARISEAU, on behalf of themselves and all those similarly situated,

Plaintiffs

V.

DELTA AIRLINES, INC. and R.H. HEIL; W.W. HAWKINS; J.W. CALLISON; C.J. MAY; R.A. MCCLELLAND, T.J. ROECK, C.A. THOMPSON, ROBERT S. HARKEY, MAURICE WORTH; H.D. GREENBERG, R.W. COGGIN; W.R. BRAHAM, each in his official capacity as a member of the Delta Airlines Administrative Committee

Defendants

Appendix F

ORDER

The above-styled matter is presently before the court on the plaintiffs motion to certify a class action [docket no. 11] and defendant's motion to dismiss for lack of subject matter jurisdiction [docket no. 14].

Plaintiffs, and the class they seek to represent, are former employees of Delta Air Lines, Inc. ("Delta"), who retired from employment at Delta Air Lines between July 23, 1992 and January 1, 1993. Plaintiffs bring this action pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S. C. § 1001 *et seq,* and pursuant to state law authorizing recovery for breach of contract.

Plaintiffs' claims involve three general matters: ERISA claims relating to Delta's Medical Plan, ERISA claims relating to a Special Retirement Program ("SRP"), and state law claims relating to flight pass privileges.

Background

On or about July 23, 1992, Delta announced that it would be changing medical benefits for its retirees. Persons who retired after January 1, 1993, would be required to pay higher medical insurance premiums and receive lesser medical insurance benefits than persons retiring before that date. Plaintiffs allege that in subsequent weeks, representatives of Delta promised, both orally and in writing, that persons who retired on or before January 1, 1993 would be "grandfathered" in to their existing medical insurance benefits. Plaintiffs assert that Delta promised that during the course of retirement, their level of medical insurance benefits would remain constant and would not be

affected by subsequent changes in medical insurance benefits offered by Delta.

Plaintiffs claim that between the dates of July 23, 1992 and August 23, 1993, Delta's representatives also assured employees that the company had no plans to offer any package of enhanced retirement benefit incentives in the future. Many Delta employees decided to take early retirement during the period between July 23, 1992 and January 1, 1993.

On June 28, 1993 Delta amended the retirees' benefits package to require retirees to pay higher premiums for reduced medical insurance benefits. On August 23, 1993, Delta announced that the company would be offering enhanced early retirement incentives to certain of its employees (the "Special Retirement Plan" or "SRP").

Plaintiffs also assert that during the course of their employment with Delta, they received assurances that after their retirement, and throughout the period of their retirement, they would receive passes enabling the retirees and their spouses to fly free or at nominal cost on Delta flights. Plaintiffs claim that the only eligibility restriction placed upon these flight pass privileges was that the Delta retiree seeking to use them had to be at least 52 years old and had to have had at least ten (10) years of service with Delta at the time he or she retired.

Delta considers the flight pass program a privilege that is subject to modification by Delta at any time. On October 26, 1993, relying on this right to modify, Delta announced that it would suspend the flight benefits of any retiree who was employed by any airline or airline affiliate, other than one affiliated by Delta Air Lines.

Appendix F

Plaintiffs allege claims of breach of contract, breach of fiduciary duty, and interference with retirement benefits under ERISA based on Delta's modification of retirees' medical plan benefits and Delta's offer of the SRP to employees subsequent to plaintiffs' retirement date. Plaintiffs further assert a state law claim for breach of contract based on Delta's announcement that retirees who work for airlines other than Delta are no longer entitled to flight pass privileges.

Motion to Dismiss

Defendants move to dismiss Count Five of Plaintiff's Amended Complaint for lack of subject matter jurisdiction. Count Five is a state law breach of contract claim regarding the availability of flight pass privileges. No federal question is involved and diversity of citizenship does not exist. Therefore, subject matter jurisdiction is only possible by the exercise of supplemental jurisdiction over plaintiffs' claim.

The application of supplemental jurisdiction is statutorily controlled by 28 U.S.C. § 1367. This statute provides:

> (a) Except as provided in subsections (b) and (c) . . . , the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a).

Appendix F

Supplemental jurisdiction does not include claims where one count is "separately maintainable and determinable without any reference to the facts alleged or contentions stated in or with regard to the other count." *White v. County of Newberry, S.C.*, 985 F.2d 168, 171 (4th Cir. 1993) (citing *Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836, 848 (4th Cir. 1974)). The Eleventh Circuit has stated that in determining whether the claims form the same case or controversy, the court should look to whether each claim involves the same facts, occurrences, witnesses and evidence. *Palmer v. Hospital Authority of Randolph County*, 22 F.3d 1559, 1566 (11th Cir. 1994).

Plaintiffs base original federal jurisdiction on their ERISA claims against the defendants. After a review of the record, the court finds that plaintiffs claims do not sufficiently involve the same facts, occurrences, witnesses and evidence to warrant this court's exercise of supplemental jurisdiction over plaintiffs state law claim.

Plaintiffs' ERISA claims are based on assurances and representations made by Delta from July 23, 1992 to January 1, 1993 in the course of informing plaintiffs about their retirement options. Plaintiffs further rely on changes Delta made in retirement plans between June and August of 1993. However, plaintiffs' state law claim is based on numerous representations made by Delta throughout the course of plaintiffs employment and not necessarily during the time period when plaintiffs were considering their retirement options.

Furthermore, Delta made the changes in the flight pass privileges, that allegedly constituted a breach of contract, separately from any changes Delta made in the retirement benefits program. In fact, the two programs are administered

by separate divisions within Delta. The benefits plan is overseen by Delta's Administrative Committee whereas Delta's Pass Bureau administers the flight pass privileges.

In light of the foregoing, the court finds that Plaintiff's Count Five alleging state law breach of contract regarding the availability of flight pass privileges is separately maintainable and determinable from plaintiffs' ERISA claims. Therefore, this court does not have the power to exercise supplemental jurisdiction over the state law claim. Accordingly, defendants' motion to dismiss Count Five for lack of subject matter jurisdiction [docket no.14] is GRANTED.

Requirements to Proceed as a Class, in General

Rule 23 of the Federal Rules of Civil Procedure establishes a two-step procedure to determine if a class action is appropriate. First, plaintiffs must demonstrate that the proposed action satisfies all of the requirements of Fed. R. Civ. P. 23(a) which provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that the joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Once the proposed action passes muster under Rule 23(a)

plaintiffs must further show that the proposed action meets the requirements of at least one of the subsections of Fed. R. Civ. P. 23(b). In the instant case, plaintiffs rely primarily on Rule 23(b)(2), which provides that a class action is proper if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with the respect to the class as a whole.

In evaluating the motion for class certification, the allegations made in support of certification are taken as true, and the merits of the case are not examined. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 2152-53 (1974). The burden of showing that the requirements for class certification have been met rests with the plaintiffs. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (1993).

Discussion

Plaintiffs assert that the class, as defined, consists of more than 1800 retirees. Therefore the first prerequisite of numerosity has been met. However, after a review of the record, the court finds that the prerequisites of commonality and typicality have not been met.

The requirements of typicality and commonality are intended as a safeguard to insure that the named plaintiffs' interests are substantially coextensive with the interests of the class. *Id.* at 597. Failure to meet either of these requirements results in the denial of class certification.

Although the particular merits of each plaintiffs' claims are not issues to be considered in ruling on class certification, the

nature of plaintiffs' claims is directly relevant to a determination of whether the matters in controversy are primarily individual in character or are susceptible to proof in a class action.

Plaintiffs have not shown that the questions of fact in each affected retiree's case are common to any other retiree's case. According to plaintiffs, Delta made the representations that are at issue in this case orally, during several retirement planning seminars, and in writing, in various mailouts and fliers posted on bulletin boards. Plaintiffs must show not only whether each retiree was aware of these representations, but more importantly, the extent to which each retiree relied on the alleged representations in making his or her retirement decision. These are factual issues that must be resolved independently for each retiree.

The common questions of law and fact required by Rule 23(a)(2) are absent in this case. Plaintiffs have failed to show how the issue of each retiree's reliance on Delta's representations, a necessary element to all the ERISA claims, is susceptible to class proof. Accordingly, plaintiff's motion to certify a class action [docket no.11] is DENIED.

SUMMARY

Plaintiffs' motion to certify a class action [docket no. 11] is DENIED. Defendants' motion to dismiss Count Five of plaintiffs' Amended Complaint for lack of subject matter jurisdiction (docket no. 14] is GRANTED.

SO ORDERED, this 4 day of November, 1994.

Appendix F

s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT